BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	**)**	
	)	
Amendment of the Commission's	**)**	**MB Docket No. 10-71**
Rules Related to Retransmission	**)**	
Consent	**)**	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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SUMMARY

The time is ripe for the Commission to reform its retransmission consent rules by removing regulatory preferences favoring broadcasters, thereby promoting more balanced market-based negotiations. A legal framework developed nearly two decades ago cannot effectively promote consumer welfare and efficiency in today's much more complex video market. In contrast to the MVPD market of twenty-plus years ago – where a single cable incumbent served an entire market – the threat to a broadcast licensee of its losing access to viewers is substantially lessened by the fragmentation caused by having multiple MVPDs in the market. The increase in the number of MVPDs has, perversely, increased broadcasters' ability to abuse their bargaining power. Congress, however, empowered the Commission to take action to ensure that the retransmission consent process would not drive up basic rates for cable subscribers.

As a first step, the Commission should eliminate its network non-duplication and syndicated exclusivity rules. Elimination of these outdated rules from a bygone era will foster more market-based negotiations for broadcast signal carriage. Further, elimination of the network non-duplication and syndicated exclusivity rules will enable video providers to deliver must-have programming content to their subscribers.

The Commission also has the necessary statutory authority to adopt a standstill mechanism during retransmission consent negotiations. In light of the dramatic increase in consumer harms resulting from the Commission's outdated regulations relating to retransmission consent, adoption of a standstill provision is both consistent with the Commission's existing statutory authority and essential to any meaningful approach to the issue.

Finally, the Commission should remove its requirements related to must-buy and basic tier placement, which are just two more examples of artificial legal benefits for broadcasters that skew the retransmission consent negotiation process in their favor. Allowing MVPDs the flexibility to negotiate for the placement and packaging of these stations would lead to more innovative offerings for consumers. Collectively, these actions will remove government's thumb from the scale during retransmission consent negotiations, and move the marketplace instead to true and free negotiations between broadcasters and MVPDs.

The tactics used by local broadcasters and allowed under the current rules particularly harm the MVPDs represented by USTelecom. As relatively new MVPD entrants, their respective market share is dwarfed by incumbent cable companies. Because of the fewer number of consumers they serve, they pay higher prices for cable content and retransmission fees, which further increases the proportion of their costs attributable to content acquisition. These same companies also often provide a video, voice and data bundle, so a lost customer results in three lost revenue streams. This is even more harmful to USTelecom-member MVPDs since they often provide video at not much better than break-even level due to high content acquisition costs in order to create an attractive triple-play bundle for customers.

The Commission should eliminate unnecessary regulatory provisions favoring broadcasters, thereby mitigating or preventing broadcaster blackouts. In each designated market area, broadcasters can – and do – use their statutory and regulatory protections from a bygone era to demand exorbitant retransmission consent fees through the threat of broadcast blackouts to an MVPD. At the same time, they know full well that their programming will continue to be carried by remaining MVPDs in the market and are thus able to play MVPDs off of one another with little threat of losing a significant number of viewers. While the Commission previously concluded that negotiations between broadcasters and MVPDs occur on a level playing field since a blackout is potentially "detrimental to each side," the facts to not support this view.

During a broadcaster-initiated blackout to an MVPD in any given DMA, the broadcaster still benefits from the carriage of its signal by other MVPDs. Once the broadcaster successfully concludes its retransmission consent negotiation with one MVPD, it can simply move on to the next provider. Even when a consumer drops his or her chosen video provider due to a broadcaster blackout – as was the case for up to 306,000 consumers during the Time Warner CBS dispute – the replacement service could suffer the same fate. Even if a broadcaster experiences a nominal short-term, loss in advertising revenue during a blackout, the loss is likely to be more than offset by long-term and significant revenue gains.

Today, this unbalanced statutory and regulatory framework is being used by broadcasters to game the MVPD marketplace in order to generate windfall profits for broadcast licensees – all at the expense of Congress' intended localism goals. One study found that less than 30 seconds of a 30-minute newscast is devoted to coverage of local government, while another study found that 32 percent of local broadcast stations "did not air a single minute of news programming." Through reverse compensation mechanisms, retransmission consent fees collected by local affiliate broadcast stations are being split with network parents.

In addition to withholding their over-the-air signals, broadcasters are engaging in more aggressive tactics by blocking Internet access for consumers impacted by the retransmission consent dispute. A consumer's choice of MVPD provider should not be tied to his or her ability to access Internet content that is freely available to other consumers.

The Commission should remove government's thumb from the scale during the retransmission consent negotiation process by eliminating outdated broadcaster preferences. The Commission can achieve tremendous gains for consumers by expeditiously acting on its proposals to introduce greater balance in the negotiations between broadcasters and MVPDs.

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COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)[1] submits these comments in response to the Further Notice of Proposed Rulemaking (Notice)[2] issued by the Federal Communications Commission (Commission). The Notice seeks additional comment on whether the Commission should eliminate or modify its network non-duplication and syndicated exclusivity rules.[3] USTelecom previously filed in support of this proposal in the Commission's 2010 proceeding, while also supporting further reforms to the Commission's outdated retransmission consent framework.[4]

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

[2] *See*, Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Related to Retransmission Consent*, 79 Fed Reg. 19849 (April 10, 2014) (*Notice*).

[3] *Id.*, ¶¶ 40 – 73.

[4] *See e.g.*, Comments of USTelecom, MB Docket 10-71, submitted May 18, 2010; *see also*, Comments of USTelecom, MB Docket 10-71, submitted May 27, 2011.

I. INTRODUCTION

In contrast to the MVPD market of twenty-plus years ago – where a single cable incumbent served an entire market – the threat to a broadcast licensee of its losing access to viewers is substantially lessened by the fragmentation caused by having multiple MVPDs in the market. The increase in the number of MVPDs has, perversely, increased broadcasters' ability to abuse their bargaining power.

The tactics used by local broadcasters and allowed under the current rules particularly harm the MVPDs represented by USTelecom and thus further diminish local video competition. These MVPDs are relatively new entrants whose market share is dwarfed by incumbent cable companies, particularly vertically integrated cable companies whose holdings may also include broadcast stations. Because of the fewer number of consumers they serve, they pay high prices for cable content. High prices for retransmission only further increase the proportion of their costs attributable to content acquisition, making it even more difficult for them to compete with the large cable incumbent. Having fewer customers also gives them fewer customers they can afford to lose from having broadcasts blacked out during a retransmission dispute.

Also, unlike the MVPD market of 20 years ago when only video revenues were at risk, today's MVPDs often provide a video, voice and data bundle, so when a customer is lost, three revenue streams are lost. This is even more harmful to USTelecom-member MVPDs since they often provide video at not much better than break-even level due to high content acquisition costs in order to create an attractive triple-play bundle for customers.

II. THE CURRENT RETRANSMISSION CONSENT FRAMEWORK IS BROKEN.

In each designated market area (DMA), broadcasters can – and do – use their statutory and regulatory protections from a bygone era to demand exorbitant retransmission consent fees through the threat of broadcast blackouts to an MVPD. At the same time, they know full well that their programming will continue to be carried by remaining MVPDs in the market and are thus able to play MVPDs off of one another with little threat of losing a significant number of viewers.

In a report to Congress in 2008, the Commission concluded that "as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is *detrimental to each side*."[5] But that is simply not the case today, since a broadcaster suffers no harm – and in fact substantially benefits – from pulling its signal from one of MVPDs in a given DMA. If blackouts were detrimental to local broadcasters, the number of signals pulled would be decreasing. This is clearly not the case.[6]

The retransmission consent dispute between Time Warner and CBS underscores this point. Following its 32-day dispute with CBS, Time Warner lost 306,000 TV subscribers,

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[5] *See*, FCC Report, *Retransmission Consent and Exclusivity Rules: Report to Congress, Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, p. 25, September 8, 2008 (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf) (visited June 26, 2014) (emphasis added) (*2008 Report*).

[6] *See*, p. 9, *infra*, noting that there were 12 blackouts in 2010, 51 in 2011, 91 in 2012, and a record-setting 127 broadcast blackouts in 2013. There has also been dramatic increase in the length of broadcaster blackouts. In 2010, the longest blackout lasted only 24 days, and in 2011, 16 of the 51 blackouts lasted over 24 days. By 2012, there were 30 blackouts that lasted over 24 days, two of which lasted 121 days. And by 2013, there were 72 blackouts lasting over 24 days, four of which lasted more than 74 days, and one which as of the date of this filing has continued for 193 days.

24,000 high-speed data subscribers and 128,000 voice subscribers.[7] During the dispute, which lasted right up until the beginning of the football season (a common broadcaster tactic),[8] CBS blacked out its channels for Time Warner customers in many major markets, including New York, Dallas and Los Angeles. Time Warner acknowledged that "[n]ot surprisingly, we saw some customers disconnect." In addition to the direct impact of the blackout, there was "no question the disputes resulted in a whole lot of call volume," and that this volume made it hard for potential customers to actually get through to Time Warner sales agents.[9]

In stark contrast, during the same earnings period CBS reported the company's "best-ever third quarter results."[10] Leslie Moonves, President and Chief Executive Officer of CBS, acknowledged that their "third-quarter results – driven by double-digit revenue growth," were due in part to "very strong growth" in retransmission consent fees.[11] Of course, while consumers

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[7] Hilary Lewis, Alan Block, *Time Warner Cable Loses 306,000 TV Subscribers Amid CBS Dispute*, Hollywood Report, October 31, 2013 (available at: http://www.hollywoodreporter.com/news/time-warner-cable-loses-306000-652131) (visited June 26, 2014) (*Hollywood Reporter Article*).

[8] *See e.g.*, Michael Malone, Broadcasting and Cable, *Moonves: Give Us Our Retrans Cut*, March 1, 2010 (quoting CBS Corporation President/CEO Leslie Moonves stating that "When you are sitting across from the table from an MSO and you said, by the way, your local team will not be on the air for your viewers this Sunday, it's a lot of power for us.") (available at: http://www.broadcastingcable.com/news/local-tv/moonves-give-us-our-retrans-cut/42178) (visited June 26, 2014).

[9] Maggie McGrath, *Feud With CBS Hit Time Warner Cable Profit And Subscribers*, Forbes, October 31, 2013 (available at: http://www.forbes.com/sites/maggiemcgrath/2013/10/31/feud-with-cbs-hit-time-warner-cable-profit-and-subscribers/) (visited June 26, 2014).

[10] *See*, CBS Corporation Earnings Release, November 6, 2013 (available at: http://investors.cbscorporation.com/phoenix.zhtml?c=99462&p=quarterlyearnings) (visited June 26, 2014) (*CBS Earnings Release*).

[11] *Id.*

in the impacted markets were going through the process of switching video providers, being deprived of their local broadcast content and inundating Time Warner with phone calls, CBS insisted it was "easily weathering the storm."[12]

The failure to resolve local broadcast carriage disputes through the retransmission consent process is no longer "detrimental to each side."[13] During a broadcaster-initiated blackout to an MVPD in any given DMA, the broadcaster still benefits from the carriage of its signal by other MVPDs. This is in addition to the fact that the signal is still available over the air. Moreover, once the broadcaster successfully concludes its retransmission consent negotiation with one MVPD, it can simply move on to the next provider. As a result, even when a consumer drops his or her chosen video provider due to a broadcaster blackout – as was the case for up to 306,000 consumers during the Time Warner CBS dispute – there is no guarantee that the replacement service will not eventually suffer the same fate.

Even where a broadcaster experiences a nominal short-term, loss in advertising revenue during a blackout, such a loss is likely to be more than offset by long-term and significant revenue gains. For example, during the Time Warner retransmission dispute, CBS was asking for "an unusually large increase" from a little more than 50 cents per sub, per month to approximately $2.00 by the end of the contract.[14] With such increases occurring in multiple

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[12] *See*, *Hollywood Reporter Article*.
[13] *See*, *2008 Report*, p. 25.
[14] *See*, *Hollywood Reporter Article*.

DMAs throughout the country, it is unsurprising that retransmission consent fees are projected to go from $3.3 billion in 2013 to $7.6 billion in 2019.[15]

Such an outcome is contrary to the reason Congress adopted the retransmission statute – to ensure that consumers can receive their local programming content from broadcasters. More than two decades ago, Congress acted based on its concern that cable operators were functioning as monopolies who threatened to undercut the public interest benefits associated with over-the-air broadcasting.[16] Congress was concerned that broadcasters, as stewards of the public airwaves, might lose the ability to discharge their public interest obligation to provide a "local voice" for their communities.

Congress thus sought to balance the negotiating power of cable operators in 1992 by granting powerful statutory rights to broadcast stations through the creation of the must carry/retransmission consent regime. In addition to granting broadcasters compulsory carriage rights through must carry, Congress went even further by allowing broadcast stations to bargain for carriage through the retransmission consent framework. This competitive imbalance was created to address the perceived threat posed by the monopoly cable industry, and to achieve the public interest goals of localism and a diversity of viewpoints.

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[15] Donohue, Steve, *Kagan: Retrans Fees to Hit $7.6B by 2019*, November 22, 2013 (available at: http://www.fiercecable.com/story/kagan-retrans-fees-hit-76b-2019/2013-11-22) (visited June 26, 2014).

[16] *See*, S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 (*Senate Report*) (stating that retransmission consent was initially designed to "advance[] the public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

Today, this unbalanced statutory and regulatory framework is being used by broadcasters to game the MVPD marketplace in order to generate windfall profits for broadcast licensees – all at the expense of Congress' intended localism goals. One recent study found that less than 30 seconds of a 30-minute newscast is devoted to coverage of local government,[17] while another Commission study found that 32 percent of local broadcast stations "did not air a single minute of news programming."[18] Moreover, through reverse compensation mechanisms, retransmission consent fees collected by local affiliate broadcast stations are being split with network parents. As a result, the fees that Congress intended to be used to support localism, are increasingly leaving the community. One analyst recently predicted "meaningful growth" in this area, "pegging the total of reverse retrans payments to the Big Four broadcasters at $691 million in 2014 and $1.036 billion in 2015."[19]

Congress, however, empowered the Commission to take action to ensure that this new retransmission consent process would not drive up basic rates for cable subscribers.[20] This wholly artificial construct established more than two decades ago has no place in today's MVPD

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[17] Martin Kaplan, Ph.D., Matthew Hale, Ph.D., *Local TV News in the Los Angeles Media Market: Are Stations Serving the Public Interest?*, March 11, 2010 (available at: http://www.learcenter.org/pdf/LANews2010.pdf) (visited June 26, 2014).

[18] FCC Media Ownership Study #4, Office of Strategic Planning and Policy Analysis, *Local Information Programming and the Structure of Television Markets*, p. 21, May 20, 2011 (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-308508A1.doc) (visited June 26, 2014).

[19] Jon Lafayette, Broadcasting and Cable, *Analyst Sees Station Mergers Affecting Reverse Compensation*, April 28, 2014 (available at: http://www.broadcastingcable.com/blog/currency/analyst-sees-station-mergers-affecting-reverse-compensation/130734) (visited June 26, 2014).

[20] 47 U.S.C. § 325(b)(3)(A).

marketplace, and the Commission should exercise the authority granted to it by Congress in order to address the resultant harms to consumers.

Reconciliation of present rules with market realities is needed immediately. The Commission should eliminate broadcaster preferences and take government's thumb off the scale in the retransmission consent process by moving instead to true and free negotiations between broadcasters and MVPDs. A legal framework developed nearly two decades ago cannot effectively promote consumer welfare and efficiency in today's much more complex video market.

III. CONSUMERS ARE INCREASINGLY IMPACTED BY TODAY'S BROKEN RETRANSMISSION CONSENT FRAMEWORK.

Consumers are not a party to retransmission negotiations but they are clearly impacted during their deliberations and by their outcomes, generally as pawns if not innocent victims. The imbalance in the current retransmission consent framework is driving up rates for all MVPDs and their respective subscribers, and is increasingly denying consumers' access to their local broadcast signals due to blackouts.

A. Consumers Should Not Lose Access to Their Local Broadcast Signal.

Consumers pay their MVPDs in order to more conveniently gain access to their free, over the air local programming. As of 2014, between 80 to 90 percent of households subscribe to some form of MVPD. In contrast, only about 8% of all TV households watch over-the-air broadcast TV, down from 10% in 2010.[21] This has led at least one observer to note that broadcast television, by and large, is "simply a means of delivering program content to the head-end" of a cable, satellite, or telco distributor.[22]

This marketplace reality has led to the alarming frequency with which broadcasters are using blackouts as a routine negotiating tool. For example, there were 12 blackouts in 2010, 51 in 2011, 91 in 2012, and a record-setting 127 broadcast blackouts in 2013.[23] And it is not just the instances of broadcaster blackouts that are increasing – there has also been dramatic increase in their length. In 2010, the longest blackout lasted only 24 days, and in 2011, 16 of the 51 blackouts lasted over 24 days. By 2012, there were 30 blackouts that lasted over 24 days, two of which lasted 121 days.[24] And by 2013, there were 72 blackouts lasting over 24 days, four of

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[21] *See*, Press Release, Leichtman Research Group, *86% of TV Households Subscribe to a Multi-Channel Video Service*, August 8, 2013 (available at: http://www.leichtmanresearch.com/press/080813release.html) (visited June 26, 2014).

[22] *See*, Glen O. Robinson, *Regulating Communications: Stories from the First Hundred Years*, Green Bag Journal 13, p. 314 (2010).

[23] *See*, American Television Alliance website, *Background Packet on Retransmission Consent* (available at: http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-intro-packet_v5.pdf) (visited June 25, 2014).

[24] *See*, Testimony of R. Stanton Dodge, Executive Vice President and General Counsel of DISH Network, LLC, *Innovation Versus Regulation in the Video Marketplace*, before the House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, September 11, 2013, p. 6 (available at: http://docs.house.gov/meetings/IF/IF16/20130911/101284/HHRG-113-IF16-Wstate-DodgeR-20130911.pdf) (visited June 26, 2014).

which lasted more than 74 days, and one which as of the date of this filing has continued for 193 days.[25]

While the loss of a signal severely harms a new entrant and its customers, it poses little risk to the broadcaster given its ability to continue to make its programming available to other MVPDs as well as to transmit it for free over the air and the Internet. The Commission should therefore adopt proposals that eliminate the unnecessary regulatory provisions favoring broadcasters, thereby mitigating or preventing broadcaster blackouts. Broadcasters currently have both the incentive and ability to engage in brinksmanship during retransmission consent negotiations. This in turn dramatically increases the existence of several consumer harms; loss of local programming, an increase in MVPD subscription rates and the potential imposition of unwarranted switching costs and practical burdens if consumers switch MVPDs in reaction to broadcaster blackouts. USTelecom believes that implementation of a standstill mechanism during retransmission consent negotiations will foster substantial benefits for consumers.

In light of the dramatic increase in consumer harm resulting from broadcast blackouts, Commission action in this area will achieve critical public policy goals, including the elimination of brinksmanship as a negotiating tool. It will also ensure fulfillment of the government's interest in localism – the fundamental governmental interest purportedly underlying the grant of free spectrum to broadcasters – by preventing the withholding of local broadcast signals from

[25] *See*, American Television Alliance website, *Blackout List 2010 – 2014* (available at: http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-20132.docx) (visited June 25, 2014) (*Blackout List*). On December 15, 2013, Sinclair Broadcast Group pulled its NBC station from subscribers to Buckeye Cable. *See*, *Blackout List*, p. 7.

large portions of the viewing public. Moreover, such Commission efforts will better fulfill its Section 325(b)'s existing mandate to ensure that rates for the basic service cable tier are reasonable by providing MVPDs with equal leverage during retransmission consent negotiations.

B. Consumers Should be Able to Access Content That is Freely Available to Other Internet Users.

In addition to withholding their over-the-air signals, broadcasters are engaging in more aggressive tactics by blocking Internet access for consumers impacted by the retransmission consent dispute. USTelecom has long supported the right of all consumers to access the legal content of their choice on the Internet. A consumer's choice of MVPD provider should not be tied to his or her ability to access Internet content that is freely available to other consumers.

During the most recent and visible retransmission consent dispute involving CBS and Time Warner Cable, CBS decided to block access to Time Warner Cable subscribers for full-episode viewing through its website.[26] Of course, one of the more problematic aspects of CBS's decision is that not every Time Warner Cable broadband subscriber was paying for video service. Such blocking represents the antithesis of acting in the public interest and flies in the face of Congress's goals in enacting the retransmission consent regime. USTelecom believes that during any retransmission consent dispute, consumers should not be caught in the middle.

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[26] *See*, Jeff Baumgartner, Multichannel News, *CBS Blocks TWC Broadband Subs From Accessing Full Episodes Online*, August 4, 2013 (available at: http://multichannel.com/news/content/cbs-blocks-twc-broadband-subs-accessing-full-episodes-online/357892) (visited June 25, 2014).

IV. THE COMMISSION SHOULD REMOVE REGULATORY PREFERENCES IN ORDER TO FOSTER A MARKET-BASED RETRANSMISSION CONSENT FRAMEWORK.

The absence of a competitive retransmission consent marketplace deprives MVPDs of negotiating leverage to effectively counter a broadcaster's unreasonable price demands, especially for the smaller and new entrant MVPDs represented by USTelecom. A 2007 study from the Congressional Research Service concluded that "[t]he negotiations between programmers and distributors, although private, are strongly affected by statutory and regulatory requirements and cannot be properly characterized as free-market."[27]

Under current law, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations. By virtue of these preferences, normal market dynamics cannot function as they would absent the current legal framework. By preventing true marketplace negotiations, the current retransmission consent legal framework harms consumers through increased subscription costs and the growing incidence of broadcast blackouts.

A. The Commission Should Eliminate its Network Non-Duplication and Syndicated Exclusivity Rules.

USTelecom supports elimination of the network non-duplication and syndicated exclusivity rules. Elimination of these outdated rules from a bygone era will foster more market-based negotiations for broadcast signal carriage. Further, elimination of the network non-duplication and syndicated exclusivity rules will enable video providers to deliver must-have programming content to their subscribers.

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[27] Congressional Research Service, Report to Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, p. 20, July 9, 2007 (*CRS Study*).

The Network Non-Duplication and Syndicated Exclusivity (collectively referred to as the "Exclusivity Rules") provide a broadcast station with an exclusive right to programming in a geographic area and prohibit a cable system from carrying another station with the same programming. The network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using notification procedures in the Commission's rules. The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply. Similarly, the Commission's syndicated exclusivity rules enable broadcasters to assert exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.

The outdated Exclusivity Rules have created a lopsided marketplace whereby broadcasters benefit from a competition-free environment. This regulatory wall prevents MVPDs from carrying another affiliate of the same network if retransmission consent negotiations fail. It also creates a monopoly marketplace that forestalls the benefits of true competition within any given MVPD market. As a result, MVPDs are often faced with broadcast stations adopting a 'take it or leave it' bargaining strategy.

A Congressional Research Service study supported a proposal to allow the importation of distant signals when a retransmission consent impasse develops.[28] The study concluded that such an approach could strengthen the negotiating position of MVPDs by potentially allowing them to bargain among alternative providers of the same must-have network programming.

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[28] *CRS Study*, p. 21.

In its Notice, the Commission appropriately concludes that it has the necessary authority to eliminate the exclusivity rules for MVPDs. In particular, the Commission correctly notes that Congress never explicitly mandated the adoption of network non-duplication and syndicated exclusivity rules.[29] Instead, the rules were implemented by the Commission to "provide a mechanism for broadcasters to enforce their exclusive contractual rights in network and syndicated programming by preventing cable systems from importing distant network station programming."[30]

Over time, these provisions have been applied by the Commission to Open Video Systems and direct broadcast satellite providers, for the purpose of ensuring regulatory parity between MVPDs. However, as the Commission acknowledges in its Notice, there are "no statutory provision that requires the Commission to keep the exclusivity rules on the books."[31] The Exclusivity Rules are just one example of artificial and unnecessary broadcaster preferences that the Commission has the necessary legal authority to remove. USTelecom agrees with the Commission that these rules are an "unnecessary regulatory intrusion in the marketplace."[32] By eliminating these outdated rules, the Commission will move the video marketplace towards true and free negotiations between broadcasters and MVPDs.

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[29] *Notice*, ¶ 56.

[30] *Id*.

[31] *Id.*, ¶ 57.

[32] *Notice*, ¶ 55.

B. The Commission Should Implement Interim Carriage During Retransmission Consent Disputes

The Commission also has the necessary statutory authority under Section 325(b)(3)(A) of the Act to adopt a standstill mechanism during retransmission consent negotiations. That section of the Communications Act requires the Commission to "consider …the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that … the rates for the basic service tier are reasonable." The Senate Report accompanying the legislation noted Congress's intention that the FCC "ensure that these costs do not result in excessive basic cable rates." Indeed, the Commission's initial proceeding to establish its current rules acknowledged that "[t]he statute requires that our rules ensure reasonable rates for the basic service tier."

In light of the dramatic increase in consumer harms resulting from the Commission's outdated regulations relating to retransmission consent, adoption of a standstill provision is both consistent with the Commission's existing statutory authority and essential to any meaningful approach to the issue. Such an approach would result in important benefits to consumers. As has been repeatedly emphasized in various Commission proceedings, broadcasters currently have both the incentive and ability to engage in brinksmanship during retransmission consent negotiations. This in turn, increases dramatically the existence of several consumer harms: loss of local programming for consumers, an increase in consumer MVPD subscription rates and imposition of switching costs and burdens on consumers.

USTelecom agrees that implementation of a standstill mechanism during retransmission consent negotiations will foster substantial benefits for consumers. Such a mechanism will achieve critical public policy goals, including the elimination of brinksmanship as a negotiating tool, as well as ensuring fulfillment of the government's interest in localism by preventing the withholding of local broadcast signals from large portions of the viewing public. Moreover, such a mechanism will fulfill Section 325(b)'s mandate to ensure that rates for the basic service cable tier are reasonable, by providing MVPDs with much needed leverage during retransmission consent negotiations, thereby helping to level the playing field. A standstill requirement should apply only so long as the MVPD negotiates in good faith towards a renewal agreement, and during the period while a dispute resolution proceeding remains pending.

The Commission has previously adopted a similar mechanism under its program access rules. There, in implementing a standstill provision for vertically integrated cable programming, the Commission emphasized the "many benefits" that would result from such a mechanism. Those same benefits – such as minimizing the impact on subscribers who may otherwise lose valued programming; limiting the ability of programmers to use temporary foreclosure strategies and encouraging settlement – are equally (if not more so) relevant during the retransmission consent process.

C. The Commission Should Remove its Requirements Related to "Must Buy" and Basic Tier Placement

"Must buy" provisions and basic tier requirements are just two examples of artificial legal benefits for broadcasters that skew the retransmission consent negotiation process in their favor.[33] Because broadcast stations must be carried on the basic tier in areas subject to rate

[33] "Must buy" means that consumers must purchase the broadcast channels in their local markets, and that broadcasters secure guaranteed placement on the basic tier in rate-regulated systems.

regulation, and subscribers must purchase the basic tier as a condition of purchasing any other programming services, all cable subscribers bear the costs of retransmitting a broadcast station's programming, regardless of the true value (or lack thereof) in such programming in consumers' minds if that programming had to stand on its own.

The must buy and basic tier placement mandates are examples of the imbalance in the retransmission consent negotiation process. That balance can be restored by eliminating these preferences and enabling normal marketplace negotiations to occur. Allowing MVPDs the flexibility to negotiate for the placement and packaging of these stations would lead to more innovative offerings for consumers.

V. CONCLUSION

The Commission's current retransmission consent regime is in dire need of changes that more accurately reflect today's MVPD marketplace. The Commission should eliminate broadcaster preferences and take government's thumb off the scale in the retransmission consent process by moving instead to true and free negotiations between broadcasters and MVPDs. The Commission should move forward expeditiously with its proposal to eliminate its outdated Exclusivity Rules. The Commission should also move forward with additional reforms to its retransmission consent framework, including instituting interim carriage during retransmission consent disputes, and removal of its requirements related to must-buy and basic tier placement.

Respectfully submitted,

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